

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

GRANDVIEW FOODS, LLC;
BARRETT BUSINESS SERVICES, INC.
Employer

and

Case 19-RC-14560

TEAMSTERS LOCAL UNION NO. 760,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record¹ in this proceeding, the undersigned makes the following findings and conclusions.²

SUMMARY:

The Petitioner filed the instant petition seeking a unit of warehouse employees, prep employees, inspectors, forklift drivers, washer attendants, general cleanup employees, truck dumpers, tunnel attendants, quality control employees, lab employees, line operators,³ tote makers, tote fillers, mechanics and crew leaders working at the Grandview Foods facility.⁴ In the petition, the Union names Grandview Foods, LLC ("Grandview") and Bartlett Business Services, Inc. ("BBSI") as joint Employers of the petitioned-for employees.

¹ Briefs from Grandview Foods, LLC; Barrett Business Services, Inc.; and the Petitioner were timely received and duly considered.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein; the labor organization herein involved claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

³ During the hearing the parties stipulated that line operators were not statutory supervisors and are therefore appropriately included in the unit.

⁴ The unit petitioned for by the Petitioner constitutes a wall-to-wall production and maintenance unit.

BBSI and Grandview assert that the crew leaders are statutory supervisors and therefore should be excluded from the petitioned-for unit. BBSI and Grandview also assert that the unit employees are not jointly employed by BBSI and Grandview, but are solely employed by BBSI. Finally, in its brief BBSI asserts, for the first time, that the unit petitioned-for is inappropriate because the production employees are temporary employees who lack a reasonable expectation of future employment with Grandview.⁵ Alternatively, BBSI contends that even if the Region should find that the petitioned-for employees have a reasonable expectation of future employment, any election in this unit would have to take place in 2005, because the Employer's 2004 peak season will have passed by the time a representation election in the unit can be scheduled.

Based on the following evidence and legal analysis, as well as the record as a whole, I find that: the crew leaders are not supervisors as defined by Section 2(11) of the Act; that Grandview and BBSI are joint employers of the unit employees; and that the evidence developed on the record indicates that the petitioned-for employees are seasonal and have a reasonable expectation of future employment.

I. EVIDENCE:

a) Background

1. Grandview

Grandview is a processing company that prepares and freezes vegetables for wholesale distribution. Grandview started its operations in March 2004 when it leased a processing plant from Kenyon Zero Storage in Grandview, Washington. Grandview processes green peas, snap peas, green beans, corn, and carrots and its operations are expected to be seasonal running from May through October or November each year.⁶ Grandview directly employs approximately 21 year-round employees. Besides CEO John Cedergreen, Grandview employs seven employees on the management-side of the plant. These employees are plant manager Marlin Crabtree; production supervisors Monte Price, Albert Verduzco, and Les Daniel; sanitation director Debra Turner; director of quality control Dani Young; consultant Roscoe Curnutt; and receptionist Minerva Asher. The parties stipulated that all of these employees, with the exception of Asher, are either managers or supervisors under the Act and thus should not be included in the unit. The parties also stipulated that Grandview receptionist/secretary Asher is a clerical employee who should not be included in this production and maintenance unit. Based on these stipulations, and the record

⁵ At hearing BBSI contended that the single-facility unit petitioned for by the Petitioner was inappropriate and that the only appropriate unit would also include all of the employees supplied by BBSI to Grandview and 8 other user employers involved in agribusiness. In its brief on review, BBSI dropped this contention and raised, for the first time, the issue of whether the BBSI supplied employees were seasonal or temporary employees.

⁶ Green pea and snap pea processing generally occur in June and July. Green bean processing begins in July and runs through September. Corn processing starts around the first of August and runs until approximately the first or fifteenth of October. Carrots, if they are processed this year, would run from October to November.

evidence, I shall exclude Marline Crabtree, Monte Price, Albert Verduzco, and Les Daniel, Debra Turner, Dani Young, Roscoe Curnutt, and Minerva Asher from the unit.

The remaining thirteen year-round Grandview employees are full-time maintenance employees. The maintenance employees include nine machine mechanics, including lead mechanic Dennis Huth and four refrigeration mechanics (also known as engine room employees) including lead man Dave Tobia.

Although Grandview has just taken over production operations of the Grandview plant recently, the Grandview plant has been operating in the same capacity for at least the past 35 years under different operators. Many of Grandview's current production employees have worked at the plant under its previous operators, which included Willow Wind, Agrifrozen, Agripac, and Stokely USA, and other companies. The plant employees were represented by Teamsters Local 760 when Agrifrozen, Agripac, and Stokely USA, operated the plant from approximately 1996 through June 2001.⁷

2. BBSI

Grandview has a contract with BBSI, which provides that BBSI will supply Grandview with all production employees needed for Grandview's processing season. BBSI is an employee leasing company based in Portland, Oregon. The number of production employees needed at the Grandview plant fluctuates depending on the time of year and the amount of product Grandview receives for production. During the week ending August 14, 2004, there were 341 BBSI provided production employees working at the Grandview plant. This production workforce includes employees in the following departments: production, sanitation, quality control, and maintenance.

Although the number of employees needed in each department fluctuates over the production season, the record reveals that during peak season, there may be as many as 60 production employees, 24 sanitation employees, 4 quality control employees, and 2 mechanics on a typical day shift.

The contract between BBSI and Grandview provides that BBSI will charge Grandview a certain per-hour rate for the employees it provides based on the employee's skill level, plus a mark up to cover BBSI's costs. BBSI takes care of payroll, taxes, and worker's compensation claims for all of the production employees. The contract also provides for time and a half billing rate for any employees supplied by BBSI who work overtime and sets forth that: "BBSI has the sole and exclusive right and responsibility to recruit, select, hire, assign, compensate, evaluate, discipline, and discharge the workers pursuant to this agreement."

Grandview hired Marlin Crabtree as its plant manager. Crabtree has worked at the plant for 35 years and has held the position of plant manager at the plant for the past 25 of those years. Based on Crabtree's experience, Grandview determined the staffing needs, including the types of positions and the numbers of workers needed in

⁷ Employer witness plant manager Marlin Crabtree testified that the plant operations have not changed significantly over the past 35 years that he has been with the plant. The bargaining units at the plant while it was represented by Teamsters 760 were similar to the petitioned-for bargaining unit here and included crew leaders. It appears that crew leaders were included in the unit by stipulation of the parties, however, they were not subject to a Board determination.

each position in order to run the operation. BBSI agreed to provide workers to fill these positions and assigned a skill level to each position. BBSI suggested the compensation rates for each skill level and Grandview approved the recommendation. Grandview does not know what wage rates employees provided by BBSI receive as that is left up to BBSI's discretion.

Jeff Krug is the branch manager for BBSI in Central Washington. He is responsible for five BBSI offices, including the Prosser Washington office, which supplies employees to the Grandview plant. All of the Grandview's production employees apply and are hired through the BBSI Prosser office. Because many of the production employees had been working at the Grandview plant under its previous operator, Grandview put signs up at the plant letting employees know that if they wanted to work for Grandview they should go to the BBSI office in Prosser to fill out an application. BBSI also placed ads in the newspaper to attract production employee applicants. Grandview has no involvement in the interviewing or hiring process of the BBSI supplied employees. BBSI does consider previous work experience at the Grandview plant to weigh in favor of hiring an applicant, however. In fact, it appears that BBSI did not consider it necessary to interview Grandview applicants who had previous work experience at the Grandview plant before offering them employment.

b) Plant Structure

Grandview plant manager Crabtree is in charge of overseeing production at the plant. Grandview's production supervisors, sanitation supervisor, and lab supervisor, all report to Crabtree. According to Crabtree, Grandview production supervisors supervise BBSI supplied crew leads and line operators.

1. On-site Coordinator

BBSI also provides an on-site coordinator, who keeps track of the seasonal employees' time cards and assigns employees to a particular shift. Rose Rivera, who was BBSI's on-site coordinator until she left the company on July 30, 2004, testified that she would fill out a shift schedule for seasonal employees based on information provided by Grandview. Grandview would fill out a work order for BBSI that specified: (1) the number of shifts needed per day; (2) the number of people that should be working on each shift, (3) how many employees of each classification the plant would need (including crew leaders) and (4) what time employees should arrive; and (5) the duration of assignment.

Rivera testified that 90% of the crew positions are general labor entry-level positions and she would plug the employees into different slots for each shift. These preliminary shift lists were then presented to Grandview for approval. Grandview has the right to approve or disapprove the list, including the crew leader designated for the shift. Plant Manager Crabtree testified that if Grandview does not approve the crew list, Grandview and BBSI would negotiate for crewmember replacements. Crabtree also testified if the crew leader is not approved by Grandview, BBSI will assign a replacement employee to the crew lead position.

In August 2004, Grandview instituted a similar policy with regard to its involvement in scheduling changes. This policy is set forth in an August 16, 2004

memo from Grandview CEO Cedergreen to his managerial and supervisory employees. The memo sets forth in pertinent part:

Changes of BBSI personnel between lines or shifts will not take place without consultation between the GF [Grandview] Production Supervisor, the BBSI Crew Leader and the BBSI On-site Coordinator except on an emergency short term basis. In this case emergency is defined as the inability to run an established line or shift unless a specific individual is moved. GF may request that a specific person be moved from job to job, shift to shift, line to line or replaced entirely. It will be the sole prerogative and responsibility of BBSI to make permanent personnel changes to any Designated Crew List. Any disputes regarding decisions made by BBSI with respect to their employees will be resolved between GF management and BBSI management.

According to Rivera, Grandview secretary Minerva Asher would give her the information to adjust schedules almost every day. Such adjustments might include circumstances that Grandview production supervisors needed production employees to come in earlier than planned or if they needed a shift to come in later than planned. Rivera also testified that sometimes a Grandview production supervisor would come to her with problems involving the employees and she would try to work it out to make Grandview happy. On these occasions, according to Rivera, the production supervisor may have spoken directly to the employee a couple of times before coming to her about the problem. According to Rivera, the production supervisors might go to the crew leaders if she was not available.

When Rivera worked as on-site coordinator she would be at the Grandview plant from 6:30 a.m. to 7:00 p.m. 7 days a week. As a result there was no on-site coordinator at the Grandview plant for the majority of the night shift, but there is a Grandview production supervisor overseeing operations during the night shift. Rivera would get calls after hours if the production crew ran out of product. Rivera testified that on these occasions, the Grandview production supervisor on duty would call Rivera and let her know that she or he was going to send the shift home because they had run out of product and what time the next shift should be sent in. When Rivera left BBSI at the end of July, BBSI did not maintain a full-time on-site coordinator position, but rather filled the on-site position with rotating employees, including Angie Burson. It appears that these rotating employees are on-site for only the hour and a half at the beginning of each shift.

2. Crew Leaders

Once the crew list has been approved by Grandview, the schedule is provided to the crew leader for that particular shift. The crew leader then takes attendance and makes sure that everyone assigned to the shift has arrived. According to Rivera, the size of the crew can vary from 10-45 employees, depending on Grandview's request.

a. Assign and Direct

If the shift is short an employee, the crew leader will request that the on-site coordinator call in a replacement. If too many employees show up for the shift, the crew leader is required to take the extra employee(s) off of the shift. Crew leader Merry Carmen testified that when she discovered that she had one too many employees on her crew, she sent “the last employee to come on board” to the on-site coordinator to see if that employee could be reassigned. This is the only instance on the record of a crew leader taking an employee off her shift. In a situation where there is an equipment breakdown, the decision of whether to send employees home early or just schedule a break is made by the Grandview production supervisor, not the crew leader. Branch Manager Jeff Krug testified generally that crew leaders could decide who would stay and who would be sent home based on their assessment of the crew member’s abilities, but the record is void of any examples of crew leaders sending employees home on their own.

There was some general testimony from higher-level supervisors that crew leaders can assign and direct employees. There were, however, only two instances of crew leaders directing employees in the record. In the first instance, crew leader Carmen Merry testified that she reassigned an employee from one production line to a lower production line because the employee was having a problem reaching on the higher production line. In the second instance, sanitation crew leader Rose Alvarado testified that she moved an elderly man from the sanitation work he was doing to lighter duty because the elderly man was not working as rapidly as the other employees. On cross-examination, Alvarado testified that she brought the issue to on-site coordinator Angie Burson, who was the one who actually reassigned the elderly man. Alvarado testified that she went to Burson because it was Angie’s job to find more appropriate work for the older employee.

b. Discipline and Discharge

None of the crew leaders who testified had ever disciplined an employee and several crew leaders testified that they did not think they had the authority to discipline employees. On-site supervisor Rivera also testified that she does not believe that crew leads could issue discipline on their own and does not know of any instance where this happened. Rivera’s replacement on-site coordinator Angie Burson testified that she did not know of any time when a crew leader had recommended discipline, but that if a crew leader recommended that an employee be disciplined, BBSI would investigate the incident. Crew leader Carmen Merry testified that although she has never disciplined an employee or recommended employee discipline, she once told her crew in a group that she had noticed that some employees were not working up to the pace of the others. This is the only specific incident of employee counseling by a crew leader in the record. Although BBSI Branch Manager Jeff Krug testified generally that crew leaders have recommended discipline and that those recommendations have been followed, he failed to give any examples of such disciplinary recommendations or the consequences of those recommendations. Crew leads also cannot suspend or terminate employees

as Branch Manager Jeff Krug testified that he must approve any such disciplinary actions.⁸

c. Other Indicia

BBSI stipulated that crew leaders do not hire, layoff, recall, or promote employees. The record also reveals that crew leaders cannot approve overtime. If there was extra work to be done it is the Grandview production supervisor who will approve an employee staying past his or her shift, not the crew leader.

3) Grandview Production Supervisors

a. Authority to Disqualify Employees

The record also indicates that Grandview production supervisors have the authority to disqualify certain employees from working in certain classifications at the plant. According to a memo written by Grandview CEO John Cedergreen to BBSI Branch Manager Jeff Krug on August 15, 2004, Grandview had been having problems with BBSI reassigning employees who had been disqualified previously by Grandview. Neither BBSI nor Grandview denies that Grandview has the authority to disqualify certain employees from assignments at the Grandview facility.

b. Recommending Promotions

There are several instances on the record of seasonal employees being promoted to crew leader positions upon a Grandview production supervisor's recommendation. For example, crew leader Merry Carmen testified that production supervisor Albert Verduzco asked her whether she would like to be promoted to a crew leader position and two weeks later Verduzco told her she had been promoted to crew leader. Crew leader Rose Alvarado testified that Grandview sanitation supervisor Debra Turner asked her if she wanted to be a crew leader and she said yes. Soon thereafter Alvarado was given a crew leader position in the sanitation department. Finally, crew leader Juliana Herrera testified that the BBSI on-site coordinator told her that she was going to be taken out of the crew leader position. According to Herrera, about a day after Production Supervisor Daniel told her that he was going speak to plant manager Crabtree about keeping Herrera on as a crew leader, Herrera was returned to her crew leader position.

Grandview production supervisors do not have the authority to discipline or discharge seasonal employees. If a Grandview production supervisor observes a BBSI worker that is not performing as necessary, he would refer that person to either the BBSI crew leader or BBSI on-site coordinator. A production supervisor would only ask a seasonal employee to leave the premises if that employee were doing something illegal and/or dangerous and if there was no BBSI supervisory representative present. Although Grandview production supervisors do have the authority to place an employee on a disqualified list, BBSI plant manager Krug must approve suspension and discharge decisions.

⁸ Krug testified that he reviews the facts of the incident by talking to the affected employee and considers prior company discipline and employment law when he makes such disciplinary decisions.

c. Assign and Direct

Several of the production employees testified that they are supervised directly by Grandview production supervisors. For example, line operator Adela Valles testified that she would go to her production supervisor when she has a problem or a question and is in frequent communication with the production supervisor all day long. Forklift driver Miguel Barajas also testified that production supervisors Daniel and Price tell him where to move and place product boxes and that he is in constant contact with these production supervisors throughout the day.

It appears from the record that the production supervisors in the plant had more direct communication with the crew employees prior to the filing of the instant petition. On August 16, 2004, after the petition in this case was filed, Grandview CEO John Cedergreen found it necessary to write a memo to his managerial and supervisory employees, which spelled out the new chain of command that he wanted to be followed with regard to scheduling employees. In particular, this memo laid out that if a production supervisor had a scheduling request or concern, the production supervisor should go through either the crew leader or the on-site manager, rather than address the crew employees directly. Cedergreen testified that he created this memo because the production supervisors were confused and having a hard time switching from the old culture of the plant where production supervisors had more hands on responsibilities and would speak directly to the employees and the new structure where they were supposed to go through BBSI.⁹ Production Supervisor Les Daniel also testified that he has had a hard time adjusting to this change as he used to direct, discipline, and evaluate employees directly, and has now been directed to go through BBSI regarding employee these issues.

The introduction to the memo states: "This procedure will go into effect as of this date and will remain in effect until further notice from me." The memo further specifies that:

Much of the communication will funnel through the BBSI Crew Leader. This is a *significant addition* to the scope of their job. It is essential that the BBSI personnel and the GF supervisory personnel clearly explain, train and support the Crew Leaders in these *new responsibilities*. (Emphasis added)

Thus it appears from the memo that these reporting procedures are new to the crew leaders as of the date of the memo's issuance.

⁹ John Cedergreen also that he wrote this memo in order to address the fact that he had heard from plant manager Crabtree that some of the production supervisors had been complaining that BBSI was sending in too many rotating employees for each shift and that they were seeing too many new faces each shift. According to Cedergreen it appeared that the production supervisors wanted to work more steadily with a group or crew of employees. BBSI has responded to this concern by making an effort to schedule the same employees on the same shifts at Grandview's request.

4) Other Departments

a. Sanitation Department

The plant has a large sanitation department headed by Grandview Sanitation Supervisor Debra Turner. At peak season, there are approximately 20-24 seasonal sanitation employees on the day shift. Sanitation employees are responsible for cleaning the equipment at the plant. In a memo written by CEO John Cedergreen to Grandview's managerial and supervisory employees dated August 16, 2004, including Debra Turner, Cedergreen specifically spells out that: "Sanitation Crew Leaders will be directly supervised by GF Sanitation Supervisor," and that when Turner is not available such supervision "will be done by the GF Production Supervisor present." The memo goes on to stress the importance of communication between Grandview production supervisors, sanitation supervisor Turner, and BBSI crew leaders in coordinating the work of the sanitation and production crews.

There are many examples of sanitation crew leader Debra Turner's role in directing the work of the sanitation crew in the record. Sanitation crew leader Rose Alvarado testified that Turner would tell Alvarado what needs to be done, where it needs to be done, and how it is supposed to be done. Alvarado also testified that Turner instructs Alvarado on what needs to be done three times a week. According to Alvarado, Turner does not communicate directly with crewmembers, but will tell Alvarado what a sanitation worker needs to do and Alvarado conveys that information to the employee. Sanitation worker Noemi Santana testified that Turner directly communicates with crewmembers if Turner does not like the work that they are doing. Santana testified that even though Turner does not speak Spanish, and Santana does not speak English, Turner is able to communicate with Santana through "gestures and yelling." As an example Santana testified that Turner will lift up a conveyor belt and scratch it and if something comes off on Turner's fingernails, Turner will show the employees and express to them that the belt needs more scrubbing. Santana testified that Turner communicates directly with her about her work two to three times a week. Sanitation night shift crew leader Norberto Dominguez also testified that Turner would directly communicate with sanitation crewmembers on his shift about their work. According to Dominguez, Turner has meetings with the crewmembers to tell them if a job was not done well. When Turner is not available, supervision of the sanitation crew leaders is done by the Grandview production supervisor who is present.

b. Lab Employees

In June 2004, there were four seasonal lab employees at the Grandview site. These employees who take samples of product and test them for quality purposes were supplied by BBSI. Prior to August 2004, there was no crew leader in the lab and lab employees reported directly to Grandview quality control supervisor Dani Young. Since August, a crew leader has been assigned to the lab, but Dani Young continues to oversee the lab.

c. Maintenance Employees

There are approximately sixteen maintenance employees at Grandview. Approximately thirteen of these are machine mechanics who work out of the machine

shop and repair line equipment like bearings and motors. Nine of these machine mechanics are year-round and were hired directly by Grandview, while two to four of the machine mechanics are seasonal and were hired through BBSI. The BBSI seasonal mechanics work side-by-side with the Grandview mechanics, work the same shift hours as the Grandview machine mechanics, and perform the same work as the Grandview machine mechanics. Although all of the machine mechanics report directly to Grandview lead mechanic Dennis Huth, seasonal production employees will contact the mechanics directly to notify them when machinery has gone down and needs to be repaired. Huth reports to Grandview Plant Manager Crabtree.

Grandview also directly employs four refrigeration mechanics (also referred to as engine room employees). The refrigeration mechanics work in the engine room where the refrigeration equipment is located. These four mechanics are solely employed by Grandview. There is usually a single refrigeration mechanic on duty per shift. A BBSI supplied tunnel attendant works in engine room regularly. The tunnel attendant informs the refrigeration engineer when the tunnels are ready to start or when they are ready to be defrosted because the products are out. The refrigeration mechanics report to Dave Tobia. Tobia reports to Marlin Crabtree.

II. ANALYSIS:

A) Supervisory Issue

1. Supervisory Indicia

As noted above, the BBSI and Grandview contend that its crew leaders are supervisors as that term is defined by Section 2(11) of the Act while the Petitioner maintains that the Employer has not met its burden of establishing that these employees possess supervisory authority.

The term supervisor is defined in Section 2(11) of the Act as follows:

[A]uthority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11).

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia establishes supervisory status as long as the performance of the function is not routine or clerical in nature but rather requires a significant degree of independent judgment. *Stephens Produce Co., Inc.*, 214 NLRB 131 (1974); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). “A worker is presumed to be a statutory employee and the burden of proving a worker is a supervisor within the meaning of Section 2(11) of the Act falls on the party who would remove the worker from the class of workers protected by the Act.” *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84 (1989); *Kentucky River Community Care, supra*. “The Board has a duty to employees to be alert not to construe supervisory status too broadly

because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect.” *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

The Supreme Court in *Kentucky River* emphasized that the degree, not the kind, of independent judgment is critical with respect to a finding of supervisory status. Put another way, the judgments made by an individual must be of a level of difficulty exceeding that which is merely routine or clerical in nature. However, the complexity of a given task is deemed equally complex, or not, regardless of the identity of the performer. A judgment that would be complex for say, a high school graduate does not become routine or clerical when performed by a Ph.D. Complexity is evaluated on an absolute scale (presumably based on an “ordinary” person), not a scale that varies according to the training, schooling, or experience of the individual judgment maker. See *Phillips Industries, Inc.*, 295 NLRB 717, 735 (1989). Moreover, independent judgment occurs when a supervisor makes decisions independent of consultation with higher management.

Initially, we note that BBSI stipulated that crew leaders do not hire, layoff, recall, or promote employees, and there is no indication from the record that crew leaders perform any of these functions.

a. Assignment and Direction

BBSI alleges that crew leaders use independent judgment in assigning and directing members of their crews. In support of this contention BBSI asserts in its brief that crew leaders make initial assignments and use their judgment in reassigning an employee to other positions based on performance. Initially, I note that it is the on-site coordinator who gives crew members their initial assignments, not crew leaders. Although there was some testimony on the record about situations where a crew leader may reassign a crew member to a different job duty, the only two examples of these assignments on the record involved a crew leader moving an employee because it was obvious that the employee was physically unable to perform the assignment that he or she was originally assigned. In one example a crew leader moved a person who was having a hard time reaching up to a lower production line where reaching was easier and in the other an elderly man was reassigned to lighter duty work because it became clear that he could not keep up with his co-workers. This observation of the physical limitations of the employees at issue is routine and does not rise to the level of independent judgment. *Quadrex Environmental Co.*, 308 NLRB 101 (1992). Moreover, in the case of the crew leader who reassigned the elderly man, on cross examination the crew leader admitted that she herself did not transfer the employee, but that she had brought the employee to the on-site coordinator to reassign him because, as the crew leader phrased it, it was the on-site coordinator’s job to find appropriate work for the employee.

BBSI also asserts that crew leaders have the authority to send employees home early when production needs are reduced. The evidence in the record demonstrates that if too many employees show up for a shift, the crew leader has no choice but to remove the extra employee from their shift. In the one instance where a crew member removed an employee from her shift, the crew leader testified that when she realized that she had one too many employees report for a shift, she asked the last employee to

arrive to report to the on-site coordinator to be reassigned. Sending the last employee to arrive on the shift away because of a crew surplus does not constitute independent judgment under these circumstances where the number of employees on the crew has been preset and the crew leader does not have the discretion to add an extra employee to the shift. *Dynamic Science*, 334 NLRB No. 56 (2001). Furthermore, the testimony of the on-site coordinator was clear that if a situation arose where production needs were reduced, it is left up to the Grandview production supervisors to decide whether employees will be sent home. The production supervisors make this determination whether it is a situation where the plant has run out of product or when a piece of the processing equipment has broken down. Although Branch Manager Krug testified generally that crew leaders have the authority to decide to send home employees when they are not needed, there were no instances on the record of a crew leader making the determination. *Sears, Roebuck & Co.*, 304 NLRB 193, 199 (1991) (conclusionary statements without supporting evidence are not sufficient to establish supervisory authority). In addition, the testimony was clear that only production supervisors would make the determination of whether employees would stay past their regularly scheduled shift for overtime work.¹⁰

In light of the above, I find that the BBSI crew leaders do not use independent judgment to assign and direct production employees.

b. Discipline and Discharge

In its brief BBSI contends that crew leaders have the authority to report disciplinary infractions to the BBSI Prosser office and that they have been issued job responsibilities that state that they have the authority to issue disciplinary notices. First, there are no instances in the record of a crew leader actually recommending employee discipline, let alone any indication that such recommendation has been followed. While it may be true that crew leaders have the authority to report disciplinary infractions, such a reportorial duty without more does not rise to the level of disciplinary authority. *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998) (Technician In Charge not a supervisor when his role in discipline beyond verbal warnings was merely reportorial); See also *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). With regard to the authority to issue disciplinary notices, the job duties referred to by the Employer were drafted and circulated to employees after the petition in the instant case was filed and such documentation has little probative value as to the crew leaders' actual disciplinary authority.

Furthermore, it is undisputed that decisions to suspend and terminate production employees rest solely with BBSI Branch Manager Krug. The only evidence of a crew leader counseling a production worker was the testimony of crew leader Carmen Merry who testified that she once told a her entire crew that some of them were not working as hard as the others. General guidance such as demonstrated here without any further consequences to individual employees certainly does not rise to the level to authority to

¹⁰ Although there was testimony that crew leaders can sign off and change employee time cards that authority is limited to reporting how many hours were worked by the employee and is merely a reporting function.

discipline. *Waverly-Cedar Falls Health Care Center*, 297 NLRB 390, 392 (1989) (“mere authority to issue oral and written warnings that do not alone affect job status does not constitute supervisory status”) *enfd.* 933 F.2d 626, 630 (8th Cir. 1991).

In consideration of the above, I do not find that crew leaders have the authority to discipline and discharge production employees.

c. Secondary Indicia

BBSI also relies on secondary indicia of supervisory status, such as pay differential and ratio of employees to supervisors in alleging that the BBSI supplied crew leaders are statutory supervisors. With regard to the fact that crew leaders are paid higher wages than crew members, the record shows that BBSI supplied line operators, whom the parties stipulated were not supervisory employees,¹¹ receive a higher hourly wage than crew leaders. I also find that BBSI’s assertion that the ratio of supervisors to employees in the plant would be unreasonable if crew leaders are not found to be supervisors is not determinative. BBSI contends that there could be as many as 100 employees on day shift during peak season and that if crew leaders are not found to be supervisors, these 100 production employees would be under the supervision on a single production supervisor. This assertion from BBSI ignores the facts set forth in the record regarding Grandview supervisory personnel and staffing during peak season shifts.

Evidence in the record shows that at peak season there may be as many as 28 employees on a production line per shift and that there may be as many as two production lines per shift. There is always one production supervisor and one to two crew leaders assigned to the productions lines. Testimony also revealed that there could be as many as 24 employees on the sanitation crew during a peak season shift. As set forth above, the Grandview sanitation supervisor Debra Turner directly supervises the sanitation crew. The evidence also revealed that in the smaller departments such as the lab employees, the engine room employees, and the mechanics, all have their own Grandview supervisors overseeing their work. Moreover, BBSI’s assertion that one production manager would supervise the 100 employees on a shift ignores the roles of Grandview’s plant manager, sanitation supervisor, quality control supervisor, and lead mechanics. While I recognize that a ratio of supervisors to production employees may be higher than in other operations, secondary indicia by itself does not confer supervisory status on employees who do not possess any primary supervisory indicia. *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998).

For the reasons stated above, I find that the BBSI supplied crew leaders are not supervisors as defined in Section 2(11) of the Act and should therefore be included in the petitioned-for unit.

¹¹ Line operators ensure that the production line machinery is running smoothly during a shift.

B) Joint Employer Issue:

1. Are production employees jointly employed?

To establish that two or more entities are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1301 (2000); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). Evidence of minimal and routine supervision of employees, limited dispute resolution authority, and the routine nature of work assignments is insufficient to establish a joint employer relationship. *Laerco Transportation*, 269 NLRB 324, 326 (1984). The Board's decisions require that the joint employers' control over these matters be direct and immediate. *TLI, Inc.*, 271 NLRB 798 (1984), *enfd* 772 F.2d 894 (3rd Cir. 1985).

The evidence discloses that BBSI recruits and hires the production employees. BBSI and Grandview agree to a set fee for the use of the supplied employees, but BBSI determines the supplied employees' hourly wages. BBSI has final authority in decisions to suspend and terminate the supplied employees, makes all relevant payroll deductions and contributions, and issues paychecks to the supplied employees.

The evidence also discloses that Grandview has significant control over the day-to-day supervision of the production employees. Grandview determines the number of shifts needed per day, the number of people that should be working on each shift, how many employees of each classification the plant will need (including crew leaders), the starting times, length of each shift, and the duration of each assignment. Grandview also has the authority to send employees home early and to disqualify employees from working in certain positions at the plant. Grandview must approve each shift assignment and has the authority to reject any employee list on the preliminary shift list. The evidence shows several instances of Grandview recommending that production employees be promoted to crew leader positions and in each of these instances, the employee has obtained that crew leader position. In addition, there is only one BBSI managerial or supervisory employee regularly on the Grandview site, the on-site coordinator. The on-site coordinator's function is primarily administrative as her duties include preparing the employees' time cards and plugging production employees into the preliminary shift schedules which are then provided to Grandview for review and approval. The on-site coordinator does not work on the floor, but rather in an office located within the plant. The on-site coordinator is not present for the majority of the plant's night shift, and that since July, there has been no full time on-site coordinator at the plant. Instead, it appears from the record that there is only an on-site coordinator at the site at the beginning and ending of each shift.

Based upon a careful review of the record evidence, I find that BBSI and Grandview are joint employers of the BBSI supplied production employees because they share control over essential terms and conditions of the production employees' employment. It appears from the record that BBSI recruits and hires production employees, determines their hourly wages, issues their paychecks, covers their workers' compensation, has final disciplinary authority, and makes payroll deductions. Grandview, on the other hand, provides day-to-day control through its own supervisors,

determines the employees' hours and work schedules, including overtime, has the authority to disqualify employees, and appears to effectively recommend employee promotions. Under these circumstances where there is no substantial on-site supervision by the supplier employer and the user employer retains substantial control over the employees' day-to-day activities, I find that the employees in question are jointly employed by the supplier and user employers. *Gourmet Award Foods*, 336 NLRB 872, 873 (2001).

Contrary to BBSI's assertion, this case is distinguishable from truck driver cases such as *Pitney Bowes*, 312 NLRB 386, 387 (1993) and *Laerco Transportation*, 269 NLRB 324 (1984), where the Board found the user employer of leased drivers was not a joint employer because of minimal and routine nature of the user employer's supervision. In those truck driver cases, the Board found that the user employer's supervision over the supplied employees was minimal because, inter alia, the drivers in the unit worked independently, chose their own routes, spent a majority of their shift off the employer's premises, and needed little oversight or supervision. I also find this case distinguishable from *Service Employees International Union, Local 525*, 329 NLRB 638 (1999), where the Board found insufficient supervisory authority to create a joint employer relationship, even though the user employer there appeared to have supervisory authority over one janitorial employee who worked the day shift. In *SEIU, Local 525*, unlike the instant case, there were fifty to sixty other janitors in the unit who did not receive any user employer supervision.

2. Do production employees and employees solely employed by Grandview share a community of interest?

As the Petitioner seeks a combined wall-to-wall unit of the jointly employed production employees and Grandview's solely employed maintenance employees, the next issue is whether the employees share a sufficient community of interest that they could be included in the same bargaining unit. In determining whether two sets of employees share a community of interest, the Board considers bargaining history, functional integration, employee interchange and contact, similarity of skills, qualifications and work performed, common supervision, and similarity in wages hours, benefits and other terms and conditions of employment. *Interstate Warehousing of Ohio*, 333 NLRB 682, 687 (2001); *Kalamazoo Paper Box Corp.*, 136 134 137 (1962).

In the instant case Grandview's maintenance department is functionally integrated into the production operation of the plant as Grandview mechanics keep the production lines operational by repairing production equipment. BBSI employees routinely contact the mechanics when there is an equipment malfunction or in an effort to coordinate freezing or defrost cycles. In addition it is undisputed that two to four of the machine mechanics are supplied by BBSI. These BBSI mechanics work side by side the nine Grandview mechanics. They perform the same work under the same supervision as the Grandview mechanics. The employees work in the same area and share the same shifts as the Grandview mechanics. There can be little doubt that these machine mechanics share a sufficient community of interest to be included in the petitioned-for unit.

With regard to the Grandview's four refrigeration mechanics, there is some evidence of employee contact as the BBSI tunnel attendant regularly communicates with the refrigeration mechanic on duty in order to coordinate tunnel freezing and defrosting schedules. There is also evidence of functional integration as the refrigeration mechanics repair and maintain refrigeration equipment, which is crucial to the plant's production. Under these circumstances, where the petitioned-for unit is a wall-to-wall unit and the refrigeration mechanics' work is functionally integrated with the operation of the plant, I find that there are some compelling reasons to include these employees in the bargained-for unit. However, it is unclear from the record how similar the terms and conditions of employment for these employees are from the other employees in the unit. As this is a close case and there are only four refrigeration mechanics at issue, I find that these four mechanics should vote subject to challenge in the election.

C) Seasonal Employee Issue

As set forth above, BBSI asserts for the first time in its post-hearing brief that BBSI production employees are not seasonal employees, but are temporary employees without a reasonable expectation of recall and thus should be excluded from the unit. BBSI also asserts in its brief that if the Region should find that the employees are seasonal employees, the election should be delayed until the next season in 2005 as the peak of the season for the Grandview plant will be passed by the time that an election in the petitioned-for unit can be scheduled.

In response to BBSI raising these issues in its post-hearing brief for the first time, the Petitioner filed a motion requesting that the Region strike these two issues. The Petitioner's filed its motion on September 15, 2004.¹² In its motion, the Petitioner

¹² In its motion the Petitioner also requests that the Region sanction BBSI for advancing a spurious multi-facility claim at hearing for the purpose of delaying the instant proceedings. The Petitioner asserts that it should be awarded attorney's fees and costs for the extra day of hearing that was held for the purposes of exploring the multi-facility issue, which was consequently dropped by BBSI in its post-hearing brief. In its response to the Petitioner's motion, the Employer asserts that it raised the multi-facility issue in good faith and withdrew the issue upon examination of the record at the hearing's conclusion.

The record reveals that two days before hearing the Region, through Hearing Officer Frank Morales, was first notified that BBSI intended to assert that any unit including the petitioned-for employees supplied by BBSI to Grandview must also include all BBSI employees who were supplied to BBSI customers. When the Region requested that BBSI submit a list of the user employers who would be involved in such a unit, BBSI refused, until the second day of hearing, to provide the list. Upon producing this list of user employers, BBSI requested that the Region give these employers notice of the proceedings so that they would have a chance to appear at the hearing and state their positions on the record. In order to provide sufficient notice, the Region scheduled an extra day of hearing to be held September 2, 2004, to allow BBSI's customers to appear and be heard. Although these employers were not true parties to the proceeding, the Region gave the other alleged user employers five days to appear and be heard on the September 2 hearing date. When the extra day of hearing was held, none of the other user employers identified appeared at the hearing. The Petitioner alleges that BBSI raised the meritless multi-facility issue and notice to BBSI's customers with no intention of seriously pursuing this legal theory, but rather for the purposes of causing a delay in these proceedings. Although the hearing was prolonged as a result of the above developments, I am unaware of any authority for me to even consider sanctions under these circumstances.

contends that at hearing BBSI expressly disavowed any claim to exclude the BBSI supplied employees on the basis that they are temporary employees and avoided producing documents pertinent to the temporary employee issue by taking this position on the record.

In its response to the Petitioner's motion, BBSI contends that it had put the Hearing Officer and other parties at the hearing on notice that one issue for the hearing involved the application of the Board's policies and rules with regard to seasonal workers. Review of the record helps clarify how BBSI presented its position regarding the seasonal vs. temporary employee issue at the hearing:

- At the beginning of the hearing BBSI did raise the seasonal employee issue by stating that its position was that the unit is a seasonal workforce and the Board's Policies and Rules with regard to Seasonal Workers would apply in this case.
- Later in the record, BBSI's attorney more explicitly asserted that BBSI is not contending that seasonal workers should be excluded from the unit. The context of BBSI's attorney statement in the record is particularly telling as it was expressed in order to avoid complying with a subpoena issued to BBSI by the Petitioner which requested documentation setting forth information probative of the seasonal employees' rate of return to the plant.
- Finally, at the conclusion of the hearing the Hearing Officer explicitly asked the parties for their final positions on the three issues raised at the hearing. In his final position statement on the record, BBSI's attorney addressed the three issues raised at hearing but did not address, or even raise, the temporary employee issue, which was not among the three issues summarized by the Hearing Officer.

I find that a fair reading of the entire record reveals that at hearing BBSI specifically disavowed the position that it now seeks to take regarding the exclusion of its employees from the unit. I recognize that pre-election hearings are non-adversarial and that parties are normally permitted to change their positions after review of the complete record. However, the circumstances herein, where a party in possession of pertinent evidence failed and/or refused to present that evidence at hearing because it took the position that it did not intend to pursue a particular position are not normal.

Under such exceptional circumstances, it appears appropriate that such party should be barred from pursuing the opposite position after the hearing has been completed. This appears particularly proper where, as here, there is no assertion that the evidence on the issue was previously unavailable to BBSI, or that changed circumstances exist. To find otherwise would result in prejudice to the opposing party and the rights of employees and would undermine the Board's obligation to discharge its duties under Section 9 of the Act.

Nevertheless, despite any concerns set forth above, I conclude that the evidence in the record, such as it exists, is consistent with finding the production employees to be seasonal employees who have a reasonable expectation of future employment.

In assessing the expectation of future employment for seasonal employees for the purposes of voting eligibility and unit placement, the Board considers factors such as the size of the labor force from which the seasonal employees are recruited, the stability of the employer's labor requirements and the extent to which the employer is dependent upon seasonal labor, the actual season-to-season reemployment, and the employer's preference or recall policy regarding reemployment of seasonal employees. *L & B Cooling, Inc.*, 267 NLRB 1 (1983); *Maine Apple Growers, Inc.*, 254 NLRB 501 (1981). Here the evidence in the record indicates that even though Grandview Foods has only been operating the plant for the past few months, the plant has operated in the same capacity for the past 35 years and the operations of the plant have remained essentially the same in those years. The record also indicates that several of the employees who are working at the plant now have worked at the plant for many years under its various operators and the plant's production has remained steady. Moreover, BBSI considers the fact that an applicant has worked at the Grandview plant before to be a factor weighing in favor of hiring those employees again. It also appears from the record that those employees who had worked for the Grandview plant in the past were not even interviewed before they were hired for the season by BBSI.

Under these circumstances, I conclude that the record as it was developed at hearing supports a finding that the production employees are seasonal employees who have a reasonable expectation of future employment.

I further find that the evidence developed in the record shows that the BBSI seasonal production employees will be working in significant numbers through at least the end of October and that there is no reason to delay holding this election until next season under the circumstances presented here. BBSI's assertion that by the time an election is scheduled in this case the peak season will have concluded is not supported by the record evidence in this case as record evidence shows that Grandview will be running corn through the end of October and also intends to run carrots from October through the end of November. Accordingly, there is no indication on the record that the Grandview plant's that peak has passed. *Libby, McNeil and Libby*, 90 NLRB 279, 281 (1950); *Kelly Bros. Nurseries*, 140 NLRB 82 (1962).

III. CONCLUSION

Based on the foregoing and the record evidence, I find that the following employees of BBSI and Grandview Foods constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All warehouse employees, prep employees, inspectors, forklift drivers, washer attendants, general cleanup employees, truck dumpers, tunnel attendants, quality control employees, lab employees, line operators, tote makers, tote fillers, mechanics and crew leaders working at the Grandview Foods facility, and excluding guards, clerical, confidential, and supervisory employees as defined by the Act.¹³

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters Local Union No. 760, International Brotherhood of Teamsters, AFL-CIO.

a) LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be

¹³ As noted above, the unit placement of the four refrigeration mechanics will be resolved through the Board's challenge procedure.

clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174-1078, on or before September 29, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

b) NOTICE POSTING OBLIGATIONS

According to Board's Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

c) RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by Wednesday, October 6, 2004.

DATED in Seattle, Washington, this 22nd day of September 2004.

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174